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Mindy Kristin Longanecker

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NO ROOM FOR DISSENT: CHINA'S LAWS AGAINST DISTURBING SOCIAL ORDER UNDERMINE ITS COMMITMENTS TO FREE SPEECH AND HAMPER THE RULE OF LAW

Mindy Kristin Longanecker[†]

Abstract: The term “disturbing social order” appears in several Chinese civil and criminal laws. The vagueness of these three words, combined with the national culture of censorship, undermines various legal provisions that guarantee freedom of speech in China. As a result, laws against disturbing social order suppress nonviolent political speech in this rising world power. This became clear during the 2008 Summer Olympics in Beijing, where both individual protestors and corps of journalists found their work frustrated by laws against disturbing social order.

Chinese lawmakers could remedy this conflict of laws by clarifying the term “disturbing social order,” and by creating outlets for nonviolent dissent that are protected by procedural safeguards. Such measures would help reinvest the Chinese people’s faith in their government and grant the country increased political legitimacy in the international community. While such action would represent a departure from centuries of censorship in the country, it is crucial to China’s continued political and economic success.

I. INTRODUCTION

On August 11, 2008, while millions of Chinese watched to see how many medals their country could win in the Olympic Games, Ji Sizun disappeared.¹ Ji Sizun was a legal advocate from the Fujian province.² Prior to his disappearance, he had unsuccessfully tried three times to apply for a permit to protest against government corruption in China.³ Ji Sizun was detained when he returned to the Beijing Public Security Bureau to confront officials about the disappearance of his friend Tang Xuechen.⁴ Tang Xuechen disappeared when he sought a similar protest petition several days prior.⁵ Both were missing or detained for several days during the Games.⁶

[†] Juris Doctor expected 2010, University of Washington School of Law. The author would like to thank Professor Dongsheng Zang for serving as an advisor for this piece, and Jimmy So for contributing his fascinating personal insights on the subject. The author also would like to thank Devin Smith, Mike Peters, and Adam Andrews for helping refine impassioned ramblings into a legal argument, as well as David and Mary Jane Longanecker, and Jacob Phillips for their constant support.

¹ Jill Drew & Ariana Eunjung Cha, *No Permits, No Protests in Beijing's Special 'Pens'*, WASH. POST, Aug. 15, 2008, at A14.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ See *id.* (explaining that Ji Sizun was detained and Tang Xuechen was missing).

In August of 2008, 4.7 billion viewers across the world watched the Games of the XXIX Olympiad (“the Games”) held in Beijing, China.⁷ The Games were a historic event for China, which had fought hard to win its Olympic bid and spent years preparing for the arrival of athletes and spectators.⁸ Beyond the echo of the drums from the Bird’s Nest,⁹ there was another contest going on—one that has been going on in China for centuries: the contest to be heard.

Many people, including Chinese nationals, saw the Games as a potential coming-of-age party for the rising world power.¹⁰ While many Chinese saw the 2008 Olympics as a huge success, some spectators were not so convinced. Amidst scandals about underage gymnasts,¹¹ ejected protestors,¹² and frustrated journalists,¹³ many onlookers across the world voiced outrage at China’s censorship, which remains a potent force in that nation’s culture today.¹⁴

While the interactions between journalists and the Chinese authorities during the Games highlighted the issue of censorship, the practice of denying free speech in the name of protecting social order existed long before the Beijing Olympics. This practice, which has roots in Chinese history, is codified in various Chinese laws that prohibit “disturbing social order.”¹⁵ Despite the Chinese Constitution’s guarantee of free speech, laws

⁷ *Beijing Olympics Attracts Record 4.7 Billion TV Viewers*, CHINA DAILY, Sept. 6, 2008, available at http://www.chinadaily.com.cn/olympics/2008-09/06/content_7005208.htm.

⁸ *See Beijing Sets Records in Olympics Preparation*, XINHUA NEWS AGENCY, July 24, 2004, available at <http://www.china.org.cn/english/2004/Jul/102281.htm>; International Olympic Committee Website, *Beijing 2008: Election*, http://www.olympic.org/uk/games/beijing/election_uk.asp (last visited Feb. 13, 2009).

⁹ The Beijing National Stadium is colloquially known as the Bird’s Nest. *See* Alex Pasternack, *National Stadium*, ARCHITECTURAL RECORD, July 2008, available at <http://archrecord.construction.com/projects/portfolio/archives/0807nationalstadium-1.asp>. It served as the centerpiece for the Olympic Games. *See id.*

¹⁰ *China’s Coming Out Party*, TORONTO STAR, Aug. 8, 2008, available at <http://www.thestar.com/Sports/Olympics/article/242172>.

¹¹ *See* Chris Foley, *Olympic Probe into Age-fixing of Chinese Gymnasts*, THE SYDNEY MORNING HERALD, Aug. 22, 2008, available at <http://news.smh.com.au/world/olympic-probe-into-agefixing-of-chinese-gymnasts-20080822-4049.html>.

¹² *See* Jill Drew, *China’s Choreographed Detentions: Expelled U.S. Protesters Tell of Hospitality and Haranguing*, WASH. POST, Aug. 15, 2008, at A1.

¹³ *See* Jim Yardley, *Two Concerns for Olympics: Air and Access*, N.Y. TIMES, July 9, 2008, available at <http://www.nytimes.com/2008/07/09/sports/olympics/09beijing.html>.

¹⁴ *See, e.g.,* Bill Plaschke, *Beijing Olympics Were Logistically Successful and Sneaky Too*, L.A. TIMES, Aug. 24, 2008, available at <http://articles.latimes.com/2008/aug/24/sports/sp-olyplachke24>; Saul Newman, *Why Grandpa Boycotted the Olympics*, HAARETZ, Aug. 13, 2008, available at <http://www.haaretz.com/hasen/spages/1009630.html>.

¹⁵ *See, e.g.,* XIAN FA arts. 28 & 53 (1982) (P.R.C.); Law on Assemblies, Processions, and Demonstrations [LAPD] (promulgated by the Standing Comm. Nat’l People’s Cong., Oct. 31, 1989, effective Oct. 31, 1989) LAWINFOCHINA (last visited Feb. 13, 2009) (P.R.C.); Regulation on Complaint

against disturbing social order often triumph because of the vast expanse of potential behaviors they forbid, coupled with China's pervasive culture of censorship.¹⁶ Ultimately, China's efforts to preserve social order through censorship undermine an important element of the rule of law.

While "disturbing social order" has been linked to activities such as violent protests, Chinese officials have also interpreted the term to encompass constitutionally protected free speech.¹⁷ As this Comment will show, the term has been extended to criminalize actions ranging from peaceful protests to publications and web logs ("blogs") critical of the Government and communism.¹⁸ More recently, efforts to prevent social order disturbances in China have even been applied to thwart mere attempts to get protest petitions.¹⁹ The broad interpretation of "disturbing social order" allows police to investigate activists, gather evidence, and later charge them with more serious crimes, such as subversion or dissemination of state secrets.²⁰

The terms "disturbing social order" or "disturbing public order" appear in various constitutional articles, as well as criminal and commercial laws.²¹ This Comment asserts that China's failure to specifically define these terms has led to disproportionate, irregular, and inconsistent enforcement of such laws. It also proposes that this legal phenomenon, in turn, has hindered not only commercial progress and human rights, but also some aspects of the burgeoning rule of law in China. For example, laws

Letters and Visits [RCLV] (promulgated by the St. Council, Jan. 10, 2005, effective May 1, 2005) LAWINFOCHINA (last visited Feb. 13, 2009) (P.R.C.). While this comment will focus on crimes of "disturbing social order," a similar phenomenon exists with laws against "subversion," disseminating "state secrets," endangering the state, and other related crimes, and the same behavior is often brought under the scrutiny of all such laws.

¹⁶ XIAN FA art. 35 (1982) (P.R.C.).

¹⁷ Chinese officials have rejected applications for legitimate protests and detained individuals with legitimate concerns. See, e.g., Drew & Cha, *supra* note 1; Audra Ang, *China Has Not Approved Olympic Protest Requests*, USA TODAY, Aug. 18, 2008, available at http://www.usatoday.com/news/world/2008-08-18-2381524096_x.htm; Ariana Eunjung Cha, *China's Would-Be Protesters Denied*, WASH. POST, Aug. 6, 2008, available at http://www.washingtonpost.com/wp-dyn/content/article/2008/08/05/AR2008080503197_pf.html.

¹⁸ See *infra* Section III.

¹⁹ See Drew & Cha, *supra* note 1.

²⁰ For an example of one such recent incident where a popular AIDS activist was convicted of subverting state power in a one day trial, see Scott Simon, *Morning Edition: Honor for Jailed, Chinese Ailing Dissident* (NPR radio broadcast Oct. 25, 2008) (recording and transcript are available at <http://www.npr.org/templates/story/story.php?storyid=96134185>). Even with laws against "disturbing social order" available as a veil for arresting those who express controversial views, the government still does not always give a reason for its arrests. See Jane Macartney, *Jigme, the Tibetan Monk Who Spoke Against Chinese Police, Is Arrested*, TIMES ONLINE, Nov. 4, 2008, available at <http://www.timesonline.co.uk/tol/news/world/asia/article5081553.ece>.

²¹ See, e.g., XIAN FA arts. 28 & 53 (1982) (P.R.C.); LAPD; RCLV.

regarding disturbing social order often override existing laws intended to guarantee free speech and press, such as Articles 35 and 41 of the Constitution of the People's Republic of China ("CPRC"). By defining these terms more precisely, the laws employing them will be less subject to discriminatory application against those who wish to peaceably speak out against the Chinese government.

Part II of this Comment will describe the history and development of the laws guaranteeing free speech and laws forbidding disturbance of social order, as well as the culture that has led to their current applications. Part III asserts that due to the inherent vagueness of the term "disturbing social order," combined with the overarching tradition of censorship in China, laws employing the term have been allowed to trump free speech commitments. Part IV suggests that in order to fulfill Article 35's commitment to free speech and avoid arbitrary, overzealous, and inappropriate application, the term "disturbing social order" must be more clearly defined, and satisfactory outlets for political dissent must be created. Part V examines whether or not such revision is feasible, likely, or desirable given the history and culture of censorship in China.

II. BACKGROUND

China has increasingly codified its commitment to free speech over the years by rewriting its Constitution and passing laws that proclaim to protect citizens' right to free speech. Despite these actions, however, censorship remains in China. In practice, limitations on acts that disturb social order—including those present in the laws that are intended to preserve free speech—serve to restrict free speech. Censorship remains in part due to problems of enforceability within Chinese law, and in part because of the country's unique history and culture of free speech suppression.

A. *In Recent Years, China Has Codified Several Laws Promising Free Speech*

Despite its history of censorship, the Chinese government has codified several laws guaranteeing free speech and expression. China's Constitution was adopted by the 5th National People's Congress ("NPC") on December 4, 1982.²² Article 35 of the CPRC ("Article 35") holds that "[c]itizens of the

²² XIAN FA (1982) (P.R.C.).

People's Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration."²³

Article 41 of the CPRC ("Article 41") speaks more specifically to freedom of expression.²⁴ It proclaims citizens' right to criticize and make suggestions to the state and its officials.²⁵ It further adds that state organs must address complaints in a responsible manner, and such charges shall not be suppressed, nor shall citizens making them be subject to retaliation.²⁶

Beyond these overarching constitutional guarantees of free speech, follow-up legislation purports to protect freedom of expression in China. In 1989, the government passed the Law of the People's Republic of China on Assemblies, Processions, and Demonstrations ("LAPD"), reinforcing the existence of these three named freedoms.²⁷ The first provision lays out the statute's goal, stating: "Pursuant to the Constitution, this Law is enacted to safeguard citizens' exercise of their right to assembly, procession and demonstration according to law and to maintain social stability and public order."²⁸ In recent years, China has also been party to various international agreements guaranteeing freedom of expression, including the International Covenant on Civil and Political Rights²⁹ and the Universal Declaration of Human Rights.³⁰

Additionally, while for many years there was no explicit constitutional right to petition in China, one could be read into the nation's laws.³¹ Even so, such a right follows logically from the existence of other rights, such as

²³ *Id.* art. 35. The previous constitution guaranteed these rights, as well as the right to strike, and the "four bigs": the rights to speak out freely, air views fully, hold great debates, and write big-character posters. These, however, were abolished by the NPC in 1980 and have been cracked down on in the wake of the adoption of the 1982 Constitution. See HENRY YUHUAI HE, *DICTIONARY OF THE POLITICAL THOUGHT OF THE PEOPLE'S REPUBLIC OF CHINA* 438 (M.E. Sharpe 2001).

²⁴ "Citizens of the People's Republic of China have the right to criticize and make suggestions to any state organ or functionary. Citizens have the right to make to relevant state organs complaints and charges against, or exposures of, violation of the law or dereliction of duty by any state organ or functionary In case of complaints, charges or exposures made by citizens, the state organ concerned must deal with them in a responsible manner after ascertaining the facts. No one may suppress such complaints, charges and exposures, or retaliate against the citizens making them." XIAN FA art. 41 (1982) (P.R.C.).

²⁵ *Id.*

²⁶ *Id.*

²⁷ LAPD.

²⁸ *Id.* art. 1.

²⁹ International Covenant on Civil and Political Rights, G.A. Res. 220A (XXI), art. 19, U.N. Doc. A/6316 (Dec. 16, 1966, *entered into force* Mar. 23, 1976) [hereinafter ICCPR]. This agreement, however, includes a limitation for exercise of free speech rights "[f]or the protection of national security or of *public order*." *Id.* art. 19 § 3(b) (*italics added*).

³⁰ Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 19, U.N. Doc. A/810 (Dec. 10, 1948).

³¹ See Xiaoping Chen, *The Difficult Road for Rights Advocacy: An Unpredictable Future for the Development of the Rule of Law in China*, 16 *TRANSNAT'L L. & CONTEMP. PROBS.* 221, 231-32 (2006).

the right to criticize, the right to make suggestions, the right to make complaints, and the right to make charges or expose violations of the law or dereliction of duty—all of which are protected under Article 41.³² Based on this logic, some argue that the right to petition is a fundamental right of the Chinese.³³ This right was finally codified in the Regulation on Complaint Letters and Visits (“RCLV”), passed in 2005.³⁴ This law was enacted “with a view to keeping the people’s government at all levels in close contact with the masses” by “protecting the legitimate rights and interests” of those who seek to criticize the government.³⁵ The law created a system for citizens to “[report] facts, [submit] proposals or opinions, or [file] a complaint to the people’s governments at various levels.”³⁶

In preparation for the 2008 Olympics, the Chinese government promised that journalists would have the same access they had enjoyed at previous Olympics.³⁷ The government also made provisions allowing for public protests during the event, so long as one obtained a protest permit, adhered to certain rules, and limited activities to designated protest zones.³⁸ Journalists and would-be protestors alike looked forward to discussing politically sensitive issues that were normally off limits in China, such as the Tibetan freedom movement, government corruption, and Communist oppression.³⁹ They saw this as an opportunity to showcase various important political and human rights issues not only to fellow Chinese, but also to the world abroad.⁴⁰

³² XIAN FA art. 41 (1982) (P.R.C.). See generally Xiaoping Chen, *supra* note 31, at 231-32.

³³ See Xiaoping Chen, *supra* note 31, at 231-32.

³⁴ RCLV.

³⁵ *Id.* art. 1.

³⁶ *Id.* art. 2.

³⁷ See PEN AMERICAN CENTER, BEYOND THE OLYMPICS: THE FREEDOM TO WRITE IN CHINA, AFTER THE SPOTLIGHT (Oct. 17, 2008), available at <http://www.pen.org/viewmedia.php/prmMID/2894/prmID/172>. See also Andrew Jacobs, *China to Limit Web Access During Olympic Games*, N.Y. TIMES, July 31, 2008, available at <http://www.nytimes.com/2008/07/31/sports/olympics/31china.html> [hereinafter Jacobs, *Limit Web Access*].

³⁸ See Ang, *supra* note 17; Cha, *supra* note 17.

³⁹ See generally Kathrin Bennhold & Keith Bradsher, *From Beijing to Battery Park, Activists Stress Causes*, N.Y. TIMES, Aug. 8, 2008, available at <http://www.nytimes.com/2008/08/09/sports/olympics/09protest.html>; Andrew Jacobs, *Specter of Arrest Deters Demonstrators in China*, N.Y. TIMES, Aug. 14, 2008, available at <http://www.nytimes.com/2008/08/14/sports/olympics/14protest.html> [hereinafter Jacobs, *Arrest Deters Demonstrators*]; see also Jacobs, *Limit Web Access*, *supra* note 37.

⁴⁰ See Jacobs, *Limit Web Access*, *supra* note 37.

B. Despite Free Speech Commitments, Censorship Runs Rampant in China Due to Laws that Function to Restrict Free Speech

While many of the aforementioned laws suggest affirmative grants of free speech in China, they have not been applied in a meaningful way. Free speech laws often undermine their own provisions or application. In addition, other constitutional and statutory provisions limit, or overrule, freedom of expression in China. For example, laws prohibiting “disturbing social order” work contrary to free speech commitments. As one writer put it:

The restrictions [on expression and other civil and political rights] in PRC law generally serve a legitimate purpose on their face, such as the safeguarding of national security, public order, or morality. However, in some cases involving criticism of government policies . . . the restrictions appear only to serve the interest of the ruling party or to protect the reputation of particular officials rather than to protect national security or the interests of the nation as a whole.⁴¹

1. The CPRC Curtails Free Speech by Countering Free Speech Protections and by Limiting Provisions that Guarantee Free Speech

Various constitutional and statutory provisions limit or work contrary to legal guarantees of free speech in China. The most prominent limitations of free speech in the name of maintaining social order include Articles 28, 53, and 51 of the CRPC (“Article 28,” “Article 53,” and “Article 51,” respectively), the LAPD, and the RCLV.⁴² These constitutional provisions and laws either explicitly limit free speech to preserve social order or implicitly limit free speech while proclaiming to encourage such rights.

a. Various Constitutional Provisions Limit Free Speech in the Name of Maintaining Social Order

Article 28 states, in relevant part, that “[t]he state maintains public order and suppresses treasonable and other counter-revolutionary activities; it penalizes actions that endanger public security and disrupt the socialist economy.”⁴³ Article 53, regarding obedience to the Constitution, supports

⁴¹ Randall Peerenboom, *Law and Development of Constitutional Democracy in China: Problem or Paradigm?*, 19 COLUM. J. ASIAN L. 185, 215 (2005) [hereinafter Peerenboom, *Problem or Paradigm?*].

⁴² See generally XIAN FA arts. 28, 53 & 51 (1982) (P.R.C.); LAPD; RCLV.

⁴³ XIAN FA art. 28 (1982) (P.R.C.) (emphasis added).

Article 28 and requires obedience to the rule of law generally. It provides that citizens “must abide by the constitution and the law” and must additionally “observe . . . public order.”⁴⁴ Notably, it was this Article that was invoked in cracking down on the so-called “four bigs” in response to student protests in the mid-1980s.⁴⁵

Article 51, regarding the interests of the state, functions as a catchall. It adds the most forceful caveat to all Chinese constitutional provisions, providing that “[t]he exercise by citizens of the People’s Republic of China of their freedoms and rights may not infringe upon the interests of the state, of society and of the collective, or upon the lawful freedoms and rights of other citizens.”⁴⁶

b. Provisions of Laws that Appear to Grant Free Speech Functionally Limit Free Speech

In addition to laws that expressly limit free speech, provisions of some Chinese free speech laws undermine the very rights they purport to protect. For instance, Article 4 of the LAPD states that “[i]n exercising their right to assembly, procession and demonstration, citizens must abide by the Constitution and the laws, shall not oppose the cardinal principles specified in the Constitution and shall not impair state, public or collective interests or the lawful freedoms and rights of other citizens.”⁴⁷ In practice, this language prohibits people from expressing views that oppose the government.⁴⁸ By making the LAPD subject to the Constitution under Article 4 of that act, lawmakers rendered moot any implicit protection of free speech included in the statute. Generally, when it comes to free speech, the restrictive portions of the Chinese Constitution prevail over guarantees of civil rights.⁴⁹ As recently as last year, the government of China “interpreted the [Communist Party’s] ‘leading role,’ as mandated in the constitution, as superseding and circumscribing [freedom of speech and of the press].”⁵⁰

⁴⁴ The full text of the article reads, “Citizens of the People’s Republic of China must abide by the Constitution and the law, keep state secrets, protect public property and observe labour discipline and public order and respect social ethics.” *Id.* art. 53.

⁴⁵ See HE, *supra* note 23.

⁴⁶ XIAN FA art. 51 (1982) (P.R.C.).

⁴⁷ LAPD art. 4.

⁴⁸ See LIN FENG, CONSTITUTIONAL LAW IN CHINA 272-273 (Sweet & Maxwell Asia 2000).

⁴⁹ See *id.* at 268-69.

⁵⁰ Bureau of Democracy, Hum. Rts., and Lab., U.S. Dept. of State, 2007 *Country Reports on Human Rights Practices: China (includes Tibet, Hong Kong, and Macau)* § 2(a) (Mar. 11, 2008), available at <http://www.state.gov/g/drl/rls/hrrpt/2007/100518.htm> [hereinafter U.S. Dept. of State, *Human Rights Practices: China*].

In the case of free speech, Articles 28, 51, and 53 reflect and enforce the cardinal principle of “preserving social order” in a manner that eviscerates free speech protections found in Article 35 and the LAPD. While Article 35 supposedly protects “freedom of speech, [and] of the press,” and the LAPD reinforces the freedoms of “assembly, processing, and demonstration,” in practice these freedoms are subordinate to the preservation of public order. Moreover, one’s failure to adhere to the relevant provisions of the LAPD can result in criminal charges,⁵¹ a threat which undoubtedly weighs heavily on citizens as they consider whether to risk exercising their putative right to free speech.

The RCLV, another law which appeared to facilitate free speech, has been criticized for being hasty work.⁵² The stated purposes of the law were to provide citizens an organized, legal mechanism for providing criticism to Chinese government at all levels,⁵³ to mandate that the “governments . . . shall properly handle” such criticisms, and to prevent retaliation against complainants.⁵⁴ Some argue, however, that the law was intended not to preserve free speech, but to address the increasing number of petitioners coming to Beijing.⁵⁵ One prominent scholar noted: “The law became an instrument for the leaders to use to claim that they were acting according to the law, despite the fact that the PRC has never scrutinized the law by constitutional review. The authorities have persecuted innocent Chinese in complete defiance of the law.”⁵⁶

2. *Criminal Laws Prohibiting Disturbing Social Order Threaten Free Speech*

Criminal laws prohibiting disturbing public order further hinder promises of free speech. The Chinese Criminal Code (“Criminal Code”) provides a good example of how criminal sanctions suppress free expression.⁵⁷ The Criminal Code’s stated goals are to “struggle against crime and the realities in the country, with a view to punishing crime and protecting the people.”⁵⁸ Article 290 of the Code criminalizes situations

⁵¹ See LIN FENG, *supra* note 48, at 273.

⁵² See Xiaoping Chen, *supra* note 31, at 232.

⁵³ See generally RCLV arts.1 & 2.

⁵⁴ See *id.* art. 3.

⁵⁵ See Xiaoping Chen, *supra* note 31, at 232.

⁵⁶ *Id.* at 246.

⁵⁷ The Criminal Code was adopted by the Second Sess. of the Fifth Nat’l People’s Cong. on July 1, 1979, and amended by the Fifth Sess. of the Eighth Nat’l People’s Cong. on Mar. 14, 1997.

⁵⁸ Criminal Law art. 1 (promulgated by Standing Comm. Nat’l People’s Cong., Mar. 14, 1997, effective Oct. 1, 1997) LAWINFOCHINA (last visited Feb. 13, 2009) (P.R.C.).

“where crowds are assembled to disturb public order with serious consequences.”⁵⁹ The law sentences “ringleaders” of such disturbances to between three and seven years in prison, and other active participants can receive up to three years imprisonment.⁶⁰ The Code features a separate subsection prescribing more severe punishments for those who assemble with the intention to “attack state organs.”⁶¹ Similarly, Article 291 of the Criminal Code forbids crowds from assembling to disturb order at public places, and “when the circumstances are serious,” punishes ringleaders with up to five years imprisonment.⁶² Under the crime of conducting business illegally, found in Article 225 of the Criminal Code, the government punishes one who publishes, prints, copies or distributes illegal publications, and—in so doing—“severely jeopardizes social order.”⁶³

3. *Civil Laws That Forbid Disturbing Social Order Often Curtail Free Speech*

In addition to constitutional provisions and criminal laws, civil laws restricting speech regularly thwart free speech laws intended to promote free flow of information in Chinese society.⁶⁴ As Internet use increased dramatically in the new millennium, Chinese officials became concerned with the new medium’s potential for spreading controversial information.⁶⁵ The Provisions on the Administration of Internet News Administration Service (“PAINIS”),⁶⁶ enacted in 2005, represented a concerted effort by the Chinese government to regulate dissemination of news information over the Internet.⁶⁷ Promulgated by the Ministry for Information Industry and the Press Office of the State Council, these rules represented the first meaningful

⁵⁹ *Id.* art. 290.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* art. 291.

⁶³ Interpretation of the Sup. People’s Ct. on the Application of Law in Trying the Criminal Cases of Illegal Publication, art. 11 (promulgated by Sup. People’s Ct., Dec. 23, 1998, effective Dec. 17, 1998) ISINOLAW (last visited Feb. 13, 2008) (P.R.C.); *see also* Criminal Law art. 225 (promulgated by Standing Comm. Nat’l People’s Cong., Mar. 14, 1997, effective Oct. 1, 1997) LAWINFOCHINA (last visited Feb. 13, 2009) (P.R.C.).

⁶⁴ *See generally* Provisions on Administration of Internet News Information Service [PAINIS] (promulgated by Ministry of Info. Indus. & Press Office of St. Council, Sept. 25, 2005, effective Sept. 25, 2005) LAWINFOCHINA (last visited Feb. 13, 2009) (P.R.C.).

⁶⁵ *See generally* OpenNet Initiative, *China Tightens Controls on Internet News Content Through Additional Regulations* (July 5, 2006), <http://opennet.net/bulletins/012> (last visited Jan. 28, 2009) [hereinafter OpenNet Initiative]; *see also* Joseph Kahn, *China Sets New Media Restrictions, This Time for the Internet*, N.Y. TIMES, Sept. 25, 2005, available at <http://www.nytimes.com/2005/09/25/international/asia/25cnd-china.html>.

⁶⁶ PAINIS.

⁶⁷ OpenNet Initiative, *supra* note 65.

revision to the existing laws governing Internet news, which were passed in 2000.⁶⁸

Passage of PAINIS represents an attempt to combat the Internet's effect on the dissemination of controversial speech in China.⁶⁹ While PAINIS prohibit certain forms of speech that Western societies prohibit—such as obscene pornography—they go much further by prohibiting the spread of ideas that officials believe disturb social order.⁷⁰ Specifically, Article 19 decrees that “any news information which is published or transmitted by or any electronic bulletin service of current affairs and politics which is provided by an Internet news information service provider” may not “disturb the public order or destroy the social stability by spreading any rumor.”⁷¹

In practice, however, a large amount of sex, violence, and other immoral types of speech are tolerated, while political dissent routinely draws the scrutiny of Chinese censors.⁷² While “the range of permissible topics for private speech continued to expand . . . public speeches, academic discussions, and speeches at meetings or in public forums covered by the media remained circumscribed.”⁷³ Furthermore, just last year Chinese propaganda officials issued new guidelines limiting media coverage of various controversial topics, including judicial corruption and campaigns by legal rights defenders.⁷⁴

Chinese dissidents who wish to speak out against their government theoretically have the option to “[report] facts, [submit] proposals or opinions, or [file] a complaint.”⁷⁵ The RCLV revised the petition process, by addressing complaints based on territorial jurisdiction.⁷⁶ To that end, the law emphasizes the need for “on-site settlement of problems.”⁷⁷ While the government presented this reform as facilitating free expression, many critics believe the unspoken goal of this revision was to deter activists from

⁶⁸ See OpenNet Initiative, *supra* note 65; Kahn, *supra* note 65.

⁶⁹ PAINIS; see OpenNet Initiative, *supra* note 65.

⁷⁰ PAINIS art. 19 § 6.

⁷¹ *Id.*

⁷² Shauna Emmons, *Freedom of Speech in China: A Possibility or a Prohibition?*, 23 LOY. L.A. INT'L & COMP. L. REV. 249, 259 (2001). A particularly poignant example of censorship in the publishing realm is found in new history textbooks that revise Chinese history, effectively editing out controversial figures and events in favor of “colorful tutorials on economics, technology, social customs and globalization.” Joseph Kahn, *Where's Mao? Chinese Revise History Books*, N.Y. TIMES, Sept. 1 2006, available at <http://www.nytimes.com/2006/09/01/world/asia/01china.html>.

⁷³ U.S. Dept. of State, *Human Rights Practices: China*, *supra* note 50, § 2(a).

⁷⁴ *Id.*

⁷⁵ RCLV arts. 1 & 2.

⁷⁶ *Id.* art. 4.

⁷⁷ *Id.*

expressing dissident views in Beijing during the Olympics, when the nation most needed to project a positive national image.⁷⁸ This practice effectively inhibits, rather than facilitates, free speech by diverting petitioners to local officials, who often discourage persons from petitioning and prevent them from traveling to Beijing to seek higher recourse.⁷⁹ Thus, the RCLV works to thwart not only its own potential for enforcing citizens' free speech rights, but their free speech right more generally as it is embodied in Article 35 and other guarantees.

C. *Free Speech Guarantees Go Unrealized Due to the Problems of Enforceability Inherent in the CPRC*

Another factor that prevents China's commitments to free speech from being realized is the very nature of the Chinese law, which is both imprecise and largely discretionary.⁸⁰ Unlike traditional Western legal systems, "[t]he current Chinese legal system does not formally or officially recognize cases or judicial precedents as a source of law."⁸¹ Furthermore, judicial independence is vastly constrained in China as compared to Western societies, and some argue that "China's judiciary does not appear to enjoy independence due to various external obstacles."⁸² Both the National People's Congress and the Central Committee of Politics and Law⁸³ exercise judicial oversight.⁸⁴ In addition, local Chinese people's congresses have similar powers to supervise the activities of local courts.⁸⁵ The end result of placing interpretative power in these bodies, rather than the courts, is that the application of Chinese law is often political, inconsistent, and subject to individual discretion.⁸⁶

The rule of law—the concept that a nation and all its various organs of government should adhere to a body of respected, enforceable laws—is a

⁷⁸ See Cha, *supra* note 17.

⁷⁹ See Drew & Cha, *supra* note 1.

⁸⁰ See Margaret Y.K. Woo, *Law and Discretion in Contemporary Chinese Courts*, in THE LIMITS OF THE RULE OF LAW IN CHINA 163, 172 (Karen G. Turner et al. eds., 2000) ("Unlike the Anglo-American system, with its adherence to precedent, interpretation of statutes in China is done on a case-by-case basis . . .").

⁸¹ WEI LUO, CHINESE LAW AND LEGAL RESEARCH 132 (2005); see also Woo, *supra* note 80.

⁸² See LIN FENG, *supra* note 48, at 232.

⁸³ The Central Committee of Politics and Law is a subcommittee of the Central Committee of the Chinese Communist Party.

⁸⁴ See WEI LUO, *supra* note 81, at 73-74.

⁸⁵ See Organic Law of the Local People's Congresses and Local People's Governments, art. 44 (promulgated by Standing Comm. Nat'l People's Cong., Feb. 28, 1995, effective Feb. 28, 1995) (amended 1995) LAWINFOCHINA (last visited Jan. 28, 2008) (P.R.C.); see also WEI LUO, *supra* note 81, at 31, 73.

⁸⁶ See Woo, *supra* note 80, at 163-86.

relatively new concept in China.⁸⁷ For most of China's history, the country was governed by rule of man, wherein deference was paid to human (rather than legal) authority.⁸⁸ The rule of law has been formally endorsed by the Communist Party and was codified in law in the late 1990s.⁸⁹ The Chinese recognized rule of law as an important prerequisite to a successful Olympic Games prior to the 2008 Olympics.⁹⁰ Despite these affirmations, the concept has yet to take hold fully.⁹¹

One theorist opines that "judging from the current practice in China, there is still a long way to go before China can become a rule of law state in reality."⁹² One of the reasons for this phenomenon is the lack of a rule of law tradition in China; civil rights are not being enforced currently because they have not been enforced in the past and there is no actual framework for their enforcement.⁹³ Another theorist blames the country's leadership, arguing that "Chinese leaders are unwilling to establish a rule of law. They merely use the law as an instrument . . . to crack down whenever and wherever they wish. They do not allow the law to restrain their power."⁹⁴

The struggle over free speech is a poignant example of the failure of complete rule of law in China. While provisions for free speech and expression are present in the Constitution, they lack practical application.⁹⁵ As one theorist argues: "Legal provision on freedom of expression does not mean that Chinese citizens actually enjoy the freedom of expression, especially expression on politically sensitive issues. In practice, the freedom of expression is often restricted."⁹⁶ Whatever the cause, lack of freedom of speech in China is negatively affecting the country's campaign to foster rule of law in the country. As one writer opines: "[T]he many due process violations even under China's own laws are clearly inconsistent with the efforts to implement rule of law and should be rectified."⁹⁷

⁸⁷ See LIN FENG, *supra* note 48, at 38-39.

⁸⁸ See *id.* at 38.

⁸⁹ See *id.* at 39-40; see also Xiaoping Chen, *supra* note 31, at 227, 245.

⁹⁰ Zhang Sujun, *Cultural-Enriched Olympic Games with Rule of Law*, 1 CHINA L. 54, 54 (Feb. 2008). "The holding of a high-level Olympiad with unique characteristics depends on the establishment of a favorable legal environment, which in turn is reliant on improvement of the legal quality of the entire people and promotion of the rule of law in the country." *Id.*

⁹¹ See LIN FENG, *supra* note 48, at 40. For a more optimistic view of the rule of law in China, see The State Council Information Office of China, *China's Efforts and Achievements in Promoting the Rule of Law*, 7 CHINESE J. INT'L L. 513 (Iss. 2) (July 2008).

⁹² See LIN FENG, *supra* note 48, at 40.

⁹³ See Xiaoping Chen, *supra* note 31, at 241.

⁹⁴ *Id.* at 246.

⁹⁵ See LIN FENG, *supra* note 48, at 269.

⁹⁶ *Id.* at 269.

⁹⁷ Randall Peerenboom, *Assessing Human Rights in China: Why the Double-Standard?*, 38 CORNELL INT'L L.J. 71, 117 (2005) [hereinafter Peerenboom, *Double-Standard*].

D. *Chinese Culture, Including the Influence of Communism, Fosters a Regime of Censorship that Prevents Free Speech Guarantees from Being Realized*

Although they may echo the language of Western laws, China's free speech laws exist in a very different cultural context; as a result, they are enforced in a very different manner.⁹⁸ Namely, the cultural value placed on the appearance of social order and the elimination of threats to Communist control has led to a culture of censorship in China. While the Chinese understanding of freedom of expression is similar to the Western understanding, and the restrictions are similar in their language, they operate very differently.⁹⁹ "The restriction in China is much tighter," particularly when the speech at issue relates to the government or Communist Party leadership.¹⁰⁰ Any politically controversial publication is tightly controlled by the Communist party.¹⁰¹

1. *China Maintains Strict Control of the Press*

China holds a very different conception of freedom of press than do most Western countries. The Chinese believe that freedom of expression attaches to oral expression only, and does not extend to the media.¹⁰² Freedom of press in China, then, consists of citizens' freedom to publish in all periodicals, which are put forth by publishing houses that must adhere to the state's rules.¹⁰³ While these rules purport to provide freedom of press, they contain various restrictions on publications, including those that may endanger national unity or honor.¹⁰⁴ Thus, the same government policies that appear to grant freedom of press actually limit such freedom, as the press is subject to government censorship based on any perceived threat its work presents to Chinese social order.¹⁰⁵

Compared to other sectors, the Chinese government maintains strict control over the publishing industry.¹⁰⁶ Anyone who publishes material that

⁹⁸ See LIN FENG, *supra* note 48, at 268-69.

⁹⁹ See *id.* at 269; Emmons, *supra* note 72, at 271.

¹⁰⁰ See LIN FENG, *supra* note 48, at 269.

¹⁰¹ *Id.*

¹⁰² See *id.* at 269-70.

¹⁰³ *Id.* See also Regulations on the Administration of the Publishing Industry (promulgated by St. Council, Dec. 25, 2001, effective Feb. 1, 2002) ISINOLAW (last visited Jan. 29, 2008) (P.R.C.).

¹⁰⁴ See Emmons, *supra* note 72, at 269-70; Regulations on the Administration of the Publishing Industry, art. 5 (promulgated by St. Council, Dec. 25, 2001, effective Feb. 1, 2002) ISINOLAW (last visited Jan. 29, 2008) (P.R.C.).

¹⁰⁵ See, e.g., *id.* art. 5.

¹⁰⁶ See WEI LUO, *supra* note 81, at 166.

addresses national security and social stability, or that has any significant impact on Chinese politics, economy, culture, or military, could be subject to criminal investigation and administrative sanction.¹⁰⁷ While the Chinese government generally imposes tight censorship on publishing, it is even more stringent when it comes to legal publishing,¹⁰⁸ which means that the outcomes of many legal proceedings remain secret.¹⁰⁹

2. *In Addition to Strict Government Control of the Press, Various Other Sociopolitical Elements Contribute to Suppression of Free Speech in China*

Various other sociopolitical factors have militated against the fulfillment of free speech commitments in China. One theorist attributes the fundamental lack of procedural justice in China partly to the country's long legal tradition of fusing legal and ethical norms, and allowing socialist legality to influence the Nation's legal system.¹¹⁰ He suggests that "[t]he problem of implementation also relates to the legal culture as it is reflected in the behavior of legal personnel," who are focused on getting a "good result," the meaning of which is largely culturally informed.¹¹¹

Others blame the system of Communist Party control. One author argues that, "[d]ue to the supremacy of the Party, the laws and courts have become simple instruments of Party rule. Supreme loyalty rests with the Party, not with the law or the courts Such a loyalty-based structure allows no space at all for the law."¹¹² Still others blame China's subordination of individual freedoms on a perceived need to maintain social order in the face of other nations' hostility to socialism. As one human rights commentator wrote, "[g]iven this belief in an aggregated society, it is not surprising that individual freedoms, such as speech, are frequently suppressed."¹¹³

¹⁰⁷ *Id.* at 168-70.

¹⁰⁸ *Id.* at 177.

¹⁰⁹ One difficulty facing those who seek to research free speech in China is the scarcity of resources due to existing free speech restrictions. *See id.* China does not record case law in nearly as comprehensive or organized fashion as the United States. *See id.* at 183. Thus, it is very difficult to find case law on the subject, especially regarding crimes of disturbing social order. One might argue these crimes go unreported as a strategic tactic of the government censor, who seeks to strike fear into would-be dissidents that they could be investigated, charged, and convicted behind closed doors, without due process.

¹¹⁰ Yuanyuan Shen, *Conceptions and Receptions of Legality: Understanding the Complexity of Law Reform in Modern China*, in *THE LIMITS OF THE RULE OF LAW IN CHINA* 20, 34-35 (Karen G. Turner et al. eds., 2000).

¹¹¹ *See id.* at 34.

¹¹² Xiaoping Chen, *supra* note 31, at 244.

¹¹³ *See* Emmons, *supra* note 72, at 272.

III. LAWS PROMOTING FREE SPEECH HAVE BEEN UNDERMINED BY THE ZEALOUS APPLICATION OF LAWS AIMED AT CURBING DISTURBANCE OF SOCIAL ORDER

Whatever the historical, cultural, or legal sources of this problem, China must address the problem of laws against “disturbing social order.” Instances of public order disturbances grew by almost fifty percent from 2003-2005, going from 58,000 instances in 2003 to 87,000 instances in 2005; this increase is attributable to a “surge of mass social unrest events.”¹¹⁴ Some see this as the inevitable result of a long period of fruitless petitioning and complaint filing.¹¹⁵ This phenomenon suggests that China’s strategy of suppressing free speech through persecuting those that disturb social order by expressing controversial beliefs is, at best, not working and, at worst, backfiring. “With legal avenues to seek redress choked off, citizens are taking to the streets in massive, increasingly violent, protests.”¹¹⁶ This, in turn, means more opportunities for the government to use laws against disturbing social order to suppress free speech activities. The vicious cycle of free speech suppression further threatens the rule of law, which is undermined when public order laws are allowed to trump free speech guarantees.

A. *China Has Denied Individuals Civil and Human Rights and Silenced Controversial Speech by Employing Laws That Criminalize “Disturbing Social Order”*

The Chinese government has used criminal laws prohibiting “disturbing social order” to suppress controversial speech, undercutting China’s commitments to civil rights. As one writer puts it, crimes such as “disturbing social order” and “illegal assembly” are really “catch-all excuses used to crack down on rights advocates.”¹¹⁷ Furthermore, laws suppressing free speech in the name of preserving social order affect more than just Chinese citizens. Indeed, they affect foreigners, as well. Two examples of how such censorship affects foreigners include, first, dissidents who are denied access to the country¹¹⁸ and, second, foreign journalists who are

¹¹⁴ See Xiaoping Chen, *supra* note 31, at 241.

¹¹⁵ *Id.*

¹¹⁶ See Peerenboom, *Paradigm or Problem?*, *supra* note 41, at 218; see also Richard McGregor, *China’s Official Data Confirm Rise in Social Unrest*, FIN. TIMES, Jan. 20, 2006, available at <http://www.ft.com/cms/s/0/d6050a66-8958-11da-94a6-0000779e2340.html>.

¹¹⁷ See Xiaoping Chen, *supra* note 31, at 243.

¹¹⁸ See Bennhold & Bradsher, *supra* note 39 (reporting that “Students for a Free Tibet . . . said three Americans had been detained after trying to protest near the site of the opening ceremonies in Beijing.”).

rendered impotent in their trade by Chinese censorship.¹¹⁹ As foreigners realize that China still lacks the rule of law, they will probably limit their interactions with the Chinese, for fear that their rights will not be respected.

1. *Protests Denied, Protestors Persecuted*

While China has procedures through which citizens can apply for permits to hold peaceful protests, government officials rarely grant such permits, and protest applicants and those who petition the government frequently face punishment for disturbing social order. One example of the relationship between petitioning and charges of disturbing social order is the controversial case of Wang Dan. Once a leader of the student protests in Tiananmen Square, Wang Dan was later detained for his role in coauthoring and signing various petitions addressed to the government on the sixth anniversary of that historic event.¹²⁰ The government told his relatives that he was under investigation for disturbing social order.¹²¹ He was eventually charged with conspiracy to subvert the government, the most serious charge in Chinese criminal law.¹²²

The 2008 Olympics provide another fascinating yet troubling case study of how China's petitioning laws result in charges of "disturbing social order." As part of its preparations for the 2008 Olympics, many were pleasantly surprised by China's announcement that it would be allowing protests during the Games.¹²³ The minimal restrictions—that the protests must be preapproved and take place only in designated protest zones—seemed reasonable.¹²⁴ Those who thought this announcement seemed too good to be true, however, were sadly proven correct. Despite seventy-seven applications, not one protest ever took place in the designated zones.¹²⁵

¹¹⁹ See generally Jacobs, *Limit Web Access*, *supra* note 37.

¹²⁰ HUM. RTS. WATCH/ASIA, SLAMMING THE DOOR ON DISSENT: WANG DAN'S TRIAL AND THE NEW "STATE SECURITY" ERA 2-3 (Nov. 1996), available at <http://www.hrw.org/legacy/reports/1997/china3/>.

¹²¹ *Id.* at 2.

¹²² *Id.* at 3. On the spectrum of speech offenses, disturbing social order appears to be less serious than other offenses, such as subversion or revealing state secrets. The relatively minor nature of the crime, combined with the vague terminology that encompasses a broad array of actions may actually make it a more dangerous charge, as it allows police to arrest someone for a seemingly minor infraction, and subsequently charge and imprison him for a far more serious crime. The solution here is not to increase the seriousness of the charge, but rather to properly define the nature of the offense so that it only applies to behavior that falls outside of protected free speech activity.

¹²³ See Jacobs, *Arrest Deters Demonstrators*, *supra* note 39.

¹²⁴ *Id.*

¹²⁵ Andrew Jacobs, *No Voice is Too Small for a China Still Nervous About Dissent*, N.Y. TIMES, Aug. 30, 2008, available at <http://www.nytimes.com/2008/08/30/sports/olympics/30china.html> [hereinafter Jacobs, *No Voice Too Small*].

Beyond mere denial of protest petitions, many claim that they were harassed due to their attempts to secure permission to protest.¹²⁶ Some who came to Beijing were confronted by police from their far-away hometowns, who personally escorted them home; others were prevented from going to Beijing to apply in the first place.¹²⁷ Some who applied went missing.¹²⁸ Some foreigners seeking to take advantage of the relaxed speech laws never made it into the country, while others who succeeded in entering were thrown out once their mission was made clear.¹²⁹ Lawyers who have taken up the cause of protecting these individuals have themselves become suspects of “disturbing social order” crimes in the past,¹³⁰ likely deterring them and others from such work.

In many cases, the simple act of filing a petition proved dangerous to petitioners. Two elderly women—Wu Dianyuan and Wang Xiuying—were threatened with re-education through labor due to their repeated requests for protest approval.¹³¹ This controversial form of punishment allows authorities to detain citizens without actually filing charges against them, and it has been an easy way for Chinese officials to imprison political dissidents accused of disturbing social order.¹³² At least six others were detained after applying for demonstration permits.¹³³ These detentions confirmed some citizens’ fears that the petitioning law was actually designed to expose and jail political dissidents.¹³⁴

These acts of suppression not only violate the temporary law explicitly allowing such protests, but also run counter to longstanding free speech protections in China.¹³⁵ For instance, such acts breach the Article 35 guarantee that “citizens of the People’s Republic of China enjoy freedom of speech . . . of procession and of demonstration.”¹³⁶ Despite these constitutional guarantees, no one was allowed to demonstrate even though

¹²⁶ See Drew & Cha, *supra* note 1.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Ariana E. Cha, *A Mission of Dissent in the Heart of Beijing*, WASH. POST, Aug. 23, 2008.

¹³⁰ See Xiaoping Chen, *supra* note 31, at 235-36.

¹³¹ See Andrew Jacobs, *Too Old and Frail to Re-Educate? Not in China*, N.Y. TIMES, Aug. 20, 2008, available at <http://www.nytimes.com/2008/08/21/sports/olympics/21protest.html?em>; Jacob Leibenluft, *How Educational is Re-Education?*, SLATE, Aug. 21, 2008, available at <http://www.slate.com/id/2198321/>. After international human rights groups exposed the elderly women’s story, the Chinese police rescinded the sentence, and in an odd gesture of apology, bought one of the families a new television set. See Drew & Cha, *supra* note 1.

¹³² See Leibenluft, *supra* note 131.

¹³³ See Jacobs, *No Voice Too Small*, *supra* note 125.

¹³⁴ See Ang, *supra* note 17.

¹³⁵ See, e.g., XIAN FA art. 35 (1982) (P.R.C.); LAPD art. 1.

¹³⁶ XIAN FA art. 35 (1982) (P.R.C.).

several dozen petitions were filed.¹³⁷ Such suppressive acts further infringe upon the rights protected under the LAPD. As discussed above, the LAPD supplements the promises of Article 35, guaranteeing Chinese citizens the rights to assembly, procession, and demonstration.¹³⁸ Each one of these guarantees was flouted by government officials who denied citizens' requests to protest during the Games.

2. *The Chinese Government Censored Controversial Internet News Items and Blogs*

The Internet has presented a unique challenge to Communist Party censorship.¹³⁹ By 2006, China ranked second only to the United States in number of citizens connected to the Internet, with more than 111 million users.¹⁴⁰ In the struggle over Internet content, political speech over the Internet has been suppressed as the Communist Party has employed a variety of technologies to censor this new medium.

The government has shut down websites that express unpopular views or discuss politically-sensitive subjects such as Tibet, Taiwan, and the Tiananmen Square massacre.¹⁴¹ It has detained and convicted bloggers for posting their controversial, but peaceful, views on the Internet.¹⁴² Much of this censorship has occurred under the guise of preserving social order.¹⁴³

As of 2004, at least fifty-five people were incarcerated in Chinese prisons on charges stemming from their Internet posts.¹⁴⁴ Wu Wei's site—a forum for discussions on political reform, human rights, and other subjects considered controversial by the Communist Party—was blocked, hacked, or otherwise shut down thirty-eight times between 2001 and 2004 (before the

¹³⁷ See Jacobs, *No Voice Too Small*, *supra* note 125. This number reflected petitions that were successfully submitted. As many potential protesters were prevented from submitting petitions—through everything from subtle ploys to physical force on the part of local officials—it seems likely that the number of those who wished to protest was significantly higher.

¹³⁸ See LAPD.

¹³⁹ Phillip P. Pan, *The Click That Broke a Government's Grip*, WASH. POST, Feb. 19, 2006, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/02/18/AR2006021801389_pf.html [hereinafter Pan, *The Click*].

¹⁴⁰ *Id.*

¹⁴¹ See U.S. Dept. of State, *Human Rights Practices: China*, *supra* note 50, § 2(a).

¹⁴² *Id.*

¹⁴³ See generally, Peerenboom, *Problem or Paradigm?*, *supra* note 41, at 215.

¹⁴⁴ Philip P. Pan, *Webmaster Finds Gaps in China's Net*, WASH. POST, May 24, 2004, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/02/18/AR2006021800689_pf.html [hereinafter Pan, *Webmaster Finds Gaps*].

enactment of the PAINIS).¹⁴⁵ In 2002, Beijing police arrested two essayists who regularly posted on Wu Wei's site.¹⁴⁶

One noteworthy example of Internet censorship in the name of preserving social order in China is revealed in the saga that has unfolded over the popular worldwide reference site Wikipedia.¹⁴⁷ The user-controlled nature of the site presented a unique challenge to Chinese censors.¹⁴⁸ As a result, the site has been repeatedly shut down by the government when controversial information (such as chronicles of the Tiananmen Square massacre or Taiwanese independence) has been posted by users.¹⁴⁹

Such censorship of Internet news and opinion writing violates constitutional provisions and laws that guarantee freedom of expression. For instance, this practice violates Article 35's explicit decrees of "freedom speech, [and] of press."¹⁵⁰ Furthermore, censorship of work that discusses controversial government policies or politicians violates authors' Article 41 rights to criticize the government and its officials.¹⁵¹

B. Free Speech Has Been Denied to Persons Working in the News Industry Through Commercial Laws Employing the Term "Disturbing Social Order"

Cultural understandings about freedom of expression in China, combined with state control of the media, have led to a narrow understanding of expression that encompasses only oral speech.¹⁵² Freedom of press is limited by state control.¹⁵³ More specifically, commercial laws employing the term "disturbing social order," such as the PAINIS and its subsequent revisions, have prevented the dissemination of news in China.¹⁵⁴ This censorship contradicts Article 35's promise of a free press and weakens the rule of law in China.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ See Wikipedia, *Wikipedia: About*, <http://en.wikipedia.org/wiki/Wikipedia:About> (last visited Jan. 30, 2009).

¹⁴⁸ Wikipedia is an online encyclopedia and forum wherein users create and update the content of the various entries. The authors of any given entry, such as "People's Republic of China," are various, sundry, constantly changing, and relatively anonymous. *Id.*

¹⁴⁹ Phillip P. Pan, *Reference Tool On Web Finds Fans, Censors: After Flowering as Forum, Wikipedia is Blocked Again*, WASH. POST, Feb. 20, 2006, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/02/19/AR2006021901335_pf.html.

¹⁵⁰ XIAN FA art. 35 (1982) (P.R.C.).

¹⁵¹ *Id.* art. 41.

¹⁵² See LIN FENG, *supra* note 48, at 268-270.

¹⁵³ *Id.* at 270.

¹⁵⁴ See *supra* Part II.B.3.

The Chinese government has imprisoned journalists who give news to foreigners.¹⁵⁵ Editors of publications who speak out against government policies face potential dismissal.¹⁵⁶ One example of censorship in the name of preserving social order is found in the story of a China Youth Daily editor, Li Datong. He posted a scathing critique of a new policy of the publication that was blatantly aimed at pleasing Communist Party leadership.¹⁵⁷ In his post, he argued that writers had been “debased by this . . . scheme,” which would “unavoidably create a malignant situation of servility to superior officials.”¹⁵⁸ After one day, during which his letter spread like wildfire across the Internet in China (and abroad), sites were asked to take down the piece with no legal justification.¹⁵⁹

Internet censorship also was apparent at the 2008 Olympics. When trying to win their bid for the games, Chinese officials assured the International Olympic Committee (“IOC”) that journalists would have the same level of Internet access they had enjoyed at previous games. In practice, though, journalists complained that they could not access information about controversial topics, such as Tibet or Tiananmen Square, over the Internet or elsewhere.¹⁶⁰ China’s practice of suppressing controversial speech by reporters flouts Article 35’s decree of “freedom . . . of press.”¹⁶¹ There can hardly be freedom of press when the state forbids research and writing on controversial topics that it has declared off-limits.

C. *Laws Against Disturbing Social Order Have Led to Self-Censorship*

Beyond criminalizing behavior the Constitution is supposed to protect these laws also have a deterrent effect, as both individuals and publications have begun to self-censor. “Many authors, editors and publishers exercise self-censorship,” which is sometimes even stricter than that exercised by the Communist Party.¹⁶² For example, it appears that some members of the Wikipedia community have suggested self-censorship as a way to avoid

¹⁵⁵ Congressional-Executive Commission on China, *Special Focus for 2006: Freedom of Expression*, in 2006 ANN. REP. 25, 25, available at <http://www.cecc.gov/pages/virtualAcad/exp/index.php>.

¹⁵⁶ *Id.*

¹⁵⁷ See Pan, *The Click*, *supra* note 139.

¹⁵⁸ *Full Text: Li Datong’s Memo* (Greg Distelhorst trans.), WASH. POST, Feb. 18, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/02/18/AR2006021800565.html> (providing a translation of the full text of Li Datong’s “Letter to the Editor”).

¹⁵⁹ See Pan, *The Click*, *supra* note 139.

¹⁶⁰ See Jacobs, *Limit Web Access*, *supra* note 37.

¹⁶¹ XIAN FA art. 35 (1982) (P.R.C.).

¹⁶² See LIN FENG, *supra* note 48, at 270.

government shutdown.¹⁶³ Journalists in particular have an incentive to self-censor in order to avoid the possible imprisonment, exile, and job termination they face if they go beyond the bounds tolerated by the government.¹⁶⁴ Self-censorship not only prevents dissenting views from being published, but also prevents coverage of enforcement actions against those who do not self-censor.

Self-censorship stems not only from blatant government censorship, but also from more subtle forms of government control over news media. Stations need rights in order to broadcast in a given geographic market, which some suspect causes them to self-censor in order to ensure their continued economic survival.¹⁶⁵ Reporters need access to certain restricted areas, such as the Sichuan region in the aftermath of the 2008 earthquake there. If they violate the terms of their access, reporters risk having access to restricted areas revoked.¹⁶⁶ Government information officers may pose as journalists in order to act as spies for the government: pumping reporters for information, preventing photographers from shooting, and taking pictures of journalists pursuing controversial pieces in preparation for blacklisting them.¹⁶⁷

D. There Is No Procedural Enforcement Mechanism for Those Whose Rights Have Been Violated

Some argue that the real problem is China's written law, as opposed to cultural factors that militate against free speech and weaken the rule of law. A great deal of China's written law neither provides remedial provisions with relevant procedures for victims, nor imposes specific legal responsibility on rule violators.¹⁶⁸ Some theorists argue that there is a fundamental lack of procedural justice in China.¹⁶⁹ While there are laws

¹⁶³ See Pan, *supra* note 149.

¹⁶⁴ See Emmons, *supra* note 72, at 260-61.

¹⁶⁵ Interview with Jimmy So, former reporter for ATV and former senior subeditor and anchor for TVB, Victrola Coffee Company, in Seattle, Wash. (Nov. 21, 2008) [hereinafter Interview with Jimmy So]. Jimmy So served as a reporter for the Hong Kong station ATV for two years, and then as a senior subeditor and anchor for TVB, the other major network in Hong Kong. *Id.* He was allowed comparatively more freedom as a journalist because he worked for the English language versions of these stations. *Id.* However, he often reported from mainland China, including from the Beijing Olympics, where he was much more restricted in his reporting. *Id.*

¹⁶⁶ *Id.* For instance, one cable station was allowed access to a remote village in order to cover a rocket launch there, but instead ran a story about local citizens' concerns regarding the toxic environmental impact of such launches. *Id.* When government information officers found out, they threatened the reporters and then revoked the station's access in the future. *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ See Yuanyuan Shen, *supra* note 110, at 33. See also Emmons, *supra* note 72, at 278.

¹⁶⁹ See Yuanyuan Shen, *supra* note 110, at 30-35.

against certain behaviors, there are not rules in the written law indicating the legal consequences for those who ignore the law.¹⁷⁰ Where Chinese law contains no specific enforcement provision—which is common—there is a great deal of judicial discretion.¹⁷¹

The commonplace lack of enforceability and lack of remedies in China's written law present problems.¹⁷² These problems become clear in analyzing Article 35, which appears to be a broad grant of free speech.¹⁷³ Implementation of free speech guarantees is hampered, however, by China's minimal procedural protections for those accused of crimes of disturbing social order.¹⁷⁴ A startling, though not isolated, example of lack of protection is the story of Ching Cheong, a reporter who was thrown in jail for months without being told his charge. Ching Cheong was later convicted in a one-day, private trial, of which there is no official record.¹⁷⁵

Free speech protections are also thwarted by the fact that no remedy exists for those whose rights of free speech are denied, and there are no legal sanctions against offenders.¹⁷⁶ While the rights provisions exist, there is no procedural law by which to enforce them.¹⁷⁷ In discussing Article 35, one author notes that "even today, no law provides any remedy or procedure for citizens whose 'constitutional' freedoms are impaired, and no legal sanctions [exist] for violators."¹⁷⁸ Thus, Article 35 becomes an empty promise, guaranteeing nothing.

While some Chinese laws briefly address sanctions, these provisions "are often too general and vague to apply."¹⁷⁹ Imprecision in the language of the law impairs enforcement by imposing an ambiguous mandate on legal officials, who are then hesitant to enforce it.¹⁸⁰ For instance, the last sentence of Article 41 appears to imply a cause of action, stating that "[c]itizens who have suffered losses through infringement of their civil rights by any state organ or functionary have the right to compensation in

¹⁷⁰ *Id.* at 33-34.

¹⁷¹ *Id.* at 33.

¹⁷² *See id.* at 33.

¹⁷³ XIAN FA art. 35 (1982) (P.R.C.).

¹⁷⁴ *See* Yuanyuan Shen, *supra* note 110, at 33; Emmons, *supra* note 72, at 278 ("If an individual challenges the PRC's suppression of his or her right to free speech, there is little, if any, true recourse available.").

¹⁷⁵ *See* Interview with Jimmy So, *supra* note 165.

¹⁷⁶ *See* Yuanyuan Shen, *supra* note 110, at 33.

¹⁷⁷ *See id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ Claudia Ross & Lester Ross, *Language and Law: Sources of Systematic Vagueness and Ambiguous Authority in Chinese Statutory Language*, in *THE LIMITS OF THE RULE OF LAW IN CHINA* 221, 257 (Karen G. Turner et al. eds., 2000).

accordance with the law.”¹⁸¹ However, there is no definition of “infringement of civil rights,” nor of what exactly compensation would entail. Moreover, given that Chinese courts lack real independence,¹⁸² it seems unlikely that free speech activists could use this law to their advantage; it seems unlikely that the government would deem its own suppression of free speech an infringement of citizens’ civil rights.

IV. CHINA CAN REPAIR THE DAMAGE DONE BY LAWS PREVENTING “DISTURBING SOCIAL ORDER” BY DEFINING THE TERM AND CREATING APPROPRIATE OUTLETS FOR DISSENT

In order to fulfill the promise of free speech, China need not get rid of laws against “disturbing social order” completely, but it must define key terms so they do not encompass constitutionally protected forms of nonviolent speech. China must also create appropriate channels for dissent. If China refuses to strengthen its protection of free speech, it risks increased instability and, in turn, it risks its prosperity.

A. *A Comparative Perspective: United States’ Treason Law, Freedom of Speech, and Constitutional Vagueness Jurisprudence*

The United States’ treatment of sedition provides an illuminating contrast to China’s struggle with freedom of speech and crimes of disturbing social order. While not a perfect analogy, U.S. treason laws are similar to laws against disturbing social order, as such laws also prevent speaking out against the government in a way that hinders the government’s ability to govern.

The United States has increasingly protected nonviolent free speech through a variety of mechanisms. After their experience under British rule and the failure of the Articles of Confederation, the drafters of the United States Constitution (particularly the Anti-Federalists) were concerned with providing adequate guarantees for civil liberties.¹⁸³ The Bill of Rights was adopted in 1791 in order to provide such guarantees.¹⁸⁴ One such protection was the First Amendment, guaranteeing, amongst other things, that “Congress shall make no law . . . abridging the freedom of speech, or of the

¹⁸¹ XIAN FA art. 41 (1982) (P.R.C.).

¹⁸² See LIN FENG, *supra* note 48, 230-32; Emmons, *supra* note 72, at 276.

¹⁸³ See STEWART JAY, MORTAL WORDS: A HISTORY OF THE U.S. CONSTITUTION (forthcoming 2009).

¹⁸⁴ *Id.*

press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”¹⁸⁵

The drafters of the United States Constitution specifically defined treason in order to avoid the abuses that had occurred under English rule.¹⁸⁶ Under Article III, section 3, clause 1, treason “shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid of Comfort.”¹⁸⁷ Furthermore, the United States Constitution itself provides built-in procedural protections for those accused of treason, adding that “[n]o Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.”¹⁸⁸

The first half of the twentieth century did see some suppression of free speech in the United States, especially in times of war.¹⁸⁹ For instance, in 1942 the Supreme Court enunciated the “fighting words” doctrine, whereby certain personal insults were deemed unprotected speech.¹⁹⁰ However, protection of free speech behavior—including allowing controversial speech against the government—increased in the subsequent fifty years.¹⁹¹ The Supreme Court has narrowed the “fighting words” doctrine so that it will “only tolerate the prohibition of *inflammatory* speech likely to cause an outbreak of violence and disorder.”¹⁹² It has also provided the “clear and present danger” test, under which speech may only be abridged when it is aimed at producing imminent unlawful behavior and is likely to succeed in that respect.¹⁹³

Furthermore, the United States has a specific constitutional jurisprudence invalidating laws that are unconstitutionally vague or

¹⁸⁵ U.S. CONST. amend. I.

¹⁸⁶ See THE HERITAGE FOUNDATION, *THE HERITAGE GUIDE TO THE CONSTITUTION* 264 (Edwin Messe III, ed., Regnery Publishing 2005).

¹⁸⁷ U.S. CONST. art. III, § 3, cl. 1.

¹⁸⁸ *Id.*

¹⁸⁹ See, e.g., *Schenck v. United States*, 249 U.S. 47 (1919) (affirming the conviction of a man who had published leaflets challenging the conscription system then in effect); *Dennis v. United States*, 341 U.S. 494 (1951) (upholding the Smith Act, which made punishable the advocacy of “the propriety of overthrowing or destroying any government in the United States by force and violence”); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (holding that fighting words were unprotected by the First Amendment).

¹⁹⁰ See *Chaplinsky*, 315 U.S. at 568; ERIC BARENDT, *FREEDOM OF SPEECH* 76 (Oxford Univ. Press 2005).

¹⁹¹ See, e.g., *Yates v. United States*, 354 U.S. 298, 320 (1957) (reinterpreting the Smith Act, noting that it was aimed at the advocacy of action and not ideas); *Cohen v. California*, 403 U.S. 15 (1971) (rejecting the application of the “fighting words” doctrine to appellant’s jacket bearing the words “Fuck the Draft,” in part because there was no evidence that he intended to provoke disorder or violence).

¹⁹² See BARENDT, *supra* note 190, at 297 (emphasis in original).

¹⁹³ See *Brandenburg v. Ohio*, 395 U.S. 444 (1969). See also BARENDT, *supra* note 190, at 50 (noting that the clear and present danger test “has been applied to safeguard insulting and inflammatory speech, unless the state can show that as a result imminent disorder is likely to occur.”).

overbroad. United States' courts can (and do) invalidate restrictions on free expression where the means of doing so are impermissible, even though the speech itself may be constitutionally restricted or prohibited using alternative means.¹⁹⁴

B. In Order to Restore the Legitimacy of Its Laws, China Must Clearly Define the Term "Disturbing Social Order"

Like many laws in China, laws against "disturbing social order" are vague and leave citizens and officials alike without proper guidance as to the laws' limits. The very meaning of the term is elusive. The Congressional Executive Commission on China lists several Chinese free expression laws that it considers vague and overbroad, many of which include the term "disturbing social order."¹⁹⁵ The list includes, but is not limited to, China's Regulations on the Administration of the Publishing Industry,¹⁹⁶ the Measures for the Administration of Internet Domain Names of China,¹⁹⁷ and the Management Provisions on Electronic Bulletin Services in Internet.¹⁹⁸ The Commission notes that "[t]he wording of these laws would not necessarily be vague and overbroad if PRC legislative bodies provided statutory guidance" as to what key terms mean, or "if China's courts issued meaningful opinions when deciding cases involving such matters."¹⁹⁹ But this has yet to be the case. One theorist argues that the general terms found in Chinese laws are so consistently broad as to make one wonder if "discretion has been purposefully built into them."²⁰⁰ Another argues that the discretion of Chinese courts has led to great variance in outcomes for similar cases, which has undermined the concept of a predictable legal

¹⁹⁴ See GEOFFREY R. STONE, ET AL., CONSTITUTIONAL LAW 1143 (5th ed., 2005). See also *Goodling v. Wilson*, 405 U.S. 518 (1972) (invalidating a Georgia law making it a misdemeanor to use abusive words that tend to breach the peace because it was unconstitutionally vague).

¹⁹⁵ See Congressional Executive Commission on China, Virtual Academy Website, *International Agreements & Domestic Legislation Affecting Freedom of Expression: Vague and Overbroad Regulations*, <http://www.cecc.gov/pages/virtualAcad/exp/explaws.php> (last visited Jan. 27, 2009) [hereinafter CECC Report].

¹⁹⁶ Regulations on the Administration of the Publishing Industry art. 26 § 6 (promulgated by St. Council, Dec. 25, 2001, effective Feb. 1, 2002) ISINOLAW (last visited Jan. 29, 2008) (P.R.C.).

¹⁹⁷ Measures for the Administration of Internet Domain Names of China art. 19 § 6 (promulgated by the Ministry of Info. Indust., Aug. 1, 2002, effective Sept. 30, 2002) LAWINFOCHINA (last visited Feb. 13, 2009) (P.R.C.).

¹⁹⁸ Management Provisions on the Electronic Bulletin Services in Internet art. 9 § 6 (promulgated by the Ministry of Info. Indust., Nov. 6, 2000, effective Nov. 6, 2000) LAWINFOCHINA (last visited Feb. 13, 2009) (P.R.C.).

¹⁹⁹ See CECC Report, *supra* note 195.

²⁰⁰ Woo, *supra* note 80, at 172.

system, and that this is especially problematic in cases involving individual liberties.²⁰¹

Almost all countries have laws aimed at those who seek to subvert the government in socially unacceptable ways.²⁰² One problem with China's laws against disturbing social order is their lack of specificity.²⁰³ What constitutes "disturbing social order," or what is meant by "serious" circumstances or consequences, is never defined.²⁰⁴ When the laws present ambiguous phraseology without any guidance for government officials or citizens, Chinese police and courts interpret these terms broadly and inconsistently.²⁰⁵ The vagueness swallows free speech activities that are supposedly protected under Article 35²⁰⁶ and the LAPD.²⁰⁷ Thus, while the China's quest for increased rule of law does not dictate that laws incorporating such vague language be repealed, it does indicate that these ambiguous terms must be further defined in a way that comports with constitutionally protected free speech in order for rule of law to truly be fulfilled.²⁰⁸

C. *China Must Also Create Appropriate Outlets for Dissent and Procedural Protections for Those Accused of Disturbing Social Order*

Beyond limiting judicial discretion by defining "disturbing social order," there must also be legal outlets for nonviolent dissent in order for China to fulfill its commitments to free speech. The laws enacted prior to the Olympics to allow increasing freedoms to journalists were a fine start in theory, but they were abused in practice.²⁰⁹ They also expired recently.²¹⁰ The same was true for the special petitioning regulations that were enacted for the 2008 Olympics.²¹¹ Chinese citizens need actual channels—from

²⁰¹ *Id.*

²⁰² See, e.g., Crimes Act 1961, § 73, 1961 S.N.Z. No. 43 (defining treason in New Zealand); Ugolovnyi Kodeks UK [Criminal Code] art. 275 (Russ.) (defining and laying out the punishment for high treason in Russia; U.S. CONST. art. III, § 3. (defining and providing for the punishment of treason); 18 U.S.C. § 2381 (2008) (laying out the punishment for treason in the United States).

²⁰³ See Ross & Ross, *supra* note 180.

²⁰⁴ See Criminal Law arts. 290 & 291 (promulgated by Standing Comm. Nat'l People's Cong., Mar. 14, 1997, effective Oct. 1, 1997) LAWINFOCHINA (last visited Feb. 13, 2009) (P.R.C.).

²⁰⁵ See Ross & Ross, *supra* note 180.

²⁰⁶ XIAN FA art. 35 (1982) (P.R.C.).

²⁰⁷ LAPD art. 3.

²⁰⁸ See Yuanyuan Shen, *supra* note 110, at 33-35.

²⁰⁹ See Jacobs, *Limit Web Access*, *supra* note 37.

²¹⁰ See PEN AMERICAN CENTER, *supra* note 37 (noting that the law expired on Oct. 17, 2008).

²¹¹ See *supra* Part III.A.1.

protest pens to chat rooms—to express their views about controversial topics.²¹²

To that end, perhaps China should create an inherent cause of action in all of the laws that purport to protect free speech, imposing liability on officials who seek to subvert such laws. This would force the government and the police to think carefully before arresting persons expressing nonviolent free speech. However, as Article 41 illustrates, this inherent cause of action will only promote the rule of law to the extent that free speech suppression is categorized as a civil rights violation.²¹³ China also needs to provide procedural protections for free speech activists, so that those accused of disturbing social order can have a fair trial, and so those who feel their rights have been unfairly abridged can seek redress.²¹⁴

D. China Would Benefit from Expanding Freedom of Speech

The extreme and disproportionate enforcement of the provisions against disturbing social order undermines the legitimacy of China's free speech laws, threatening major aspects of the rule of law in China. Such enforcement has led to human rights abuses that have diminished China's stature in the international community. By clearly defining what constitutes disturbing social order, China could protect freedom of speech and strengthen its internal and international legitimacy.

1. Expanding Freedom of Speech in China Will Result in Domestic Benefits

Resolving China's conflict of laws will help prevent human rights abuses against citizens and support the rule of law. In order to establish a complete and vigorous rule of law, China must create effective enforcement machinery and ensure that citizens trust the legal system.²¹⁵ Whereas the discretion currently enjoyed by the courts and government officials tends to "make law not only unpredictable but oppressive,"²¹⁶ promulgating a clear definition of "disturbing social order" will eliminate some of that discretion

²¹² See Emmons, *supra* note 72, at 276-77. Other suggestions for increasing the rule of law and individual freedom of speech include increasing transparency of Chinese court proceedings and case law and a truly independent judiciary.

²¹³ XIAN FA art. 41 (1982) (P.R.C.).

²¹⁴ Such protections could take the form of a requirement for a fair and public trial, and the establishment of a grievances office that would pursue claims of free speech infringement on behalf of citizens.

²¹⁵ See Yuanyuan Shen, *supra* note 110, at 37.

²¹⁶ *Id.* at 39.

which, in turn, should make the laws more predictable and less prone to human rights abuse. As one author put it, “a more considered analysis of the nexus between the acts and disruptions of the public order or harm to the state would expand greatly the range of civil and political rights without harming national security or state interests.”²¹⁷

Currently, many Chinese have lost faith in the country’s judicial system.²¹⁸ Recent experience indicates that expanding freedom of expression could reinvest Chinese citizens in their government. Despite the human rights offenses during the 2008 Olympics, China’s experiment with increased media openness during the lead-up to the games “[did] wonders to help China’s image domestically.”²¹⁹

Moreover, increasing freedom of speech has the potential to affirmatively benefit a country of China’s size by improving the free flow of information. Some blame the spread of China’s public health crises—such as AIDS, SARS, and the recent incidence of contaminated baby food and milk—on the country’s continued insistence on media censorship.²²⁰ According to this logic, by permanently extending and increasing the media freedoms that were temporarily granted during the 2008 Olympics, China could make an important stride “toward ensuring the timely and effective identification and resolution of future public-health crises.”²²¹ This logic could likely extend beyond public health issues, to natural disasters, economic crises, and so on. In a country of China’s size, the media could help stop problems before they become exponentially worse, but doing so would require that the government loosen its grip on the media.

2. *Expanding Freedom of Speech and Expression for Individuals and the Media Will Improve China’s Image Internationally, Attracting Foreign Business and Respect*

Resolving the conflict between free speech and laws against disturbing social order is necessary for China to achieve lasting domestic stability, legitimize its government, and engage the citizenry in the political process.²²² While China has stepped into the economic limelight in recent years, the limelight cannot completely supplant a stable rule of law that will

²¹⁷ Peerenboom, *Problem or Paradigm?*, *supra* note 41, at 217.

²¹⁸ Xiaoping Chen, *supra* note 31, at 241.

²¹⁹ Ariana E. Cha & Jill Drew, *In China, Freedom and Peril Online*, WASH. POST, Apr. 17, 2008.

²²⁰ Phelim Kine, *Censorship Isn’t Good for China’s Health*, WALL ST. J., Oct. 12, 2008, available at <http://online.wsj.article.SB122368047325124713.html>.

²²¹ *Id.*

²²² See Joe Havelly, *Giant Aspires to Superpower Status*, CNN, May 5, 2005, <http://edition.cnn.com/2005/WORLD/asiapcf/04/29/eyeonchina.superpower/index.html>.

inspire confidence among foreign investors.²²³ As one scholar put it, “[a]s [China’s] economy becomes more market oriented, it demands a type of law with higher predictability to provide a stable economic environment.”²²⁴ Furthermore, foreign investors may applaud increased human rights—the dismal state of which has dissuaded them from dealing with the country.²²⁵

E. *China’s History of Censorship Will Be Difficult to Change*

Despite the advantages China would enjoy from expanding free speech, China’s history of censorship may make this transition difficult. A Western solution may not be the best option for China, due to both China’s culture of controlled speech and the fact that Western ideas are currently in flux. Transition in present Western legal life reflects the limitations of formal legal rationality, as “maximum formal justice does not necessarily lead to maximum social justice.”²²⁶ Some might fear that such a move would be so antithetical to the Chinese way of life that it could potentially lead to chaos; the Chinese legal and governmental system is based on the communist ideal of unity of thought. One author also suggests that China has made great strides and that Westerners fail to see this because they view the situation from a Western perspective.²²⁷

Some may argue that China will reach (indeed, has reached) superpower status, while still maintaining strict control over freedom of speech. They may believe that the country’s large population and increasing economic and political prowess compensates for lacking civil rights protections. Others, particularly the Chinese government itself, insist that both free speech protection and the rule of law already exist in China.²²⁸ An intermediate view maintains that China has made great strides, particularly given how recently it began to develop its rule of law, but that it has done so at the expense of its citizens’ civil and political rights.²²⁹

²²³ *Id.* (“China has transformed from an inward-looking communist basket case, to a nation fast becoming one of the most influential in the world But being an economic heavyweight does not a superpower make Part of the problem . . . is that the Chinese political system lacks transparency and other traits of good governance needed to build trust.”). See also Yuanyuan Shen, *supra* note 110, at 35.

²²⁴ Yuanyuan Shen, *supra* note 110, at 35.

²²⁵ Caron Carlson, *Quelling Activists’ Revolt on Human Rights*, COMPLIANCE WK., May 13, 2008, available at <http://www.complianceweek.com/article/4129/quelling-activists-revolt-on-human-rights>.

²²⁶ Yuanyuan Shen, *supra* note 110, at 37.

²²⁷ See generally Peerenboom, *Double-Standard*, *supra* note 97; Peerenboom, *Problem or Paradigm*, *supra* note 41.

²²⁸ See generally The State Council Information Office of China, *supra* note 91. The government states that “Citizen’s freedom of speech, of the press, of assembly, of association, of procession and of demonstration is also guaranteed by the Constitution and the law.” *Id.* at 524.

²²⁹ See Peerenboom, *Problem or Paradigm*, *supra* note 41, at 212-18; Peerenboom, *Double-Standard*, *supra* note 97, at 112-17.

V. CONCLUSION

Despite the uncertainty inherent in achieving the significant changes suggested in this Comment, the benefits of expanding freedom of speech are worth the risks for China. The Chinese treated the 2008 Olympics as a chance to finally showcase their achievements, not only in the realm of athletics but also with respect to the rule of law and their status in the international community. This very need to prove itself to the international community, however, illustrates that the Chinese citizenry and government recognize there is work yet to be done in expanding freedom of expression in China.

Free speech guarantees are a necessary precursor to enduring political stability and economic prosperity. Foreign investors want to work in a country where they can be confident their voices will be heard and their contracts will be honored. By clearly defining crimes of disturbing social order in a way that protects free speech, China can legitimize its government and engage its citizenry. This broadening of free speech may, for lack of a better term, disturb social order in a way that fundamentally challenges the traditional Chinese culture of censorship. Ultimately, the country's future will turn on what China wants more: international respect or the appearance of national solidarity.